Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, New Hampshire and Maryland State Commissions	WC Docket No. 10-60

RESPONSIVE MEMORANDUM OF GLOBAL NAPS INC.

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INTRODUCTION

Having reviewed the nineteen comments regarding its Petition for Declaratory Ruling and Request for Preemption, Global will first address the comments made on its four requests for declaratory ruling and then analyze the responses to its request for preemption of the state commission's orders at issue.

I. GLOBAL'S REQUESTS FOR DECLARATORY RULINGS SHOULD ALL BE GRANTED PROMPTLY.

Major commentators support the rationale and substance of Global's requests, while critiques remain either misguided or unsupported in fact or law.

A. The Comments Support Rather than Refute the Need for Clarification Now.

As Global stated in its request for declaratory ruling, granting its requests would aid, not interfere, with the Commission's enunciation of its policy on the issues of VoIP and intercarrier compensation. In fact, many of the major commentators agree on this point. The Voice On the Net (VON) coalition (representing AT&T, Cisco, Google, iBasis, Microsoft, New Global Telecom, Skype, T-Mobile, Vonage and Yahoo) states that granting Global's requests now will "maintain the status quo while the Commission embarks on its much anticipated reform of [the] intercarrier compensation system. . . ." (VON Comments at 1). Verizon agrees that Global's petition "highlights several issues that require prompt Commission action regarding the regulatory rules that apply to Voice over Internet Protocol ("VoIP") services and traffic." (Verizon comments, at 1). AT&T, though critical of Global's proposals, says the Commission should take immediate action to clarify rules relating to IP/PSTN traffic, noting that "the record before the Commission on the issues raised by Global is full by any measure. . . ." (AT&T Comments, at 2).

A number of carriers and industry groups commented on the issues raised in Global's four requests for declaratory relief. Global responds to these comments by focusing on the four issues in the order in which they were initially briefed.

B. The Comments Support Rather than Refute the Requested Declaration Intrastate Tariffs are Inapplicable to VoIP Traffic.

The VON coalition states that "VoIP SERVICES ARE NOT SUBJECT TO INTRASTATE ACCESS CHARGES." (VON Comments, at 2). Similarly, Verizon states that "The Commission Should Reaffirm Its Conclusion that All VoIP Traffic is Jurisdictionally Interstate and Subject to this Commission's Exclusive Jurisdiction." (Verizon Comments, at 3). The NYPSC agrees, reaffirming its 2008 order that, "The FCC has already declared nomadic VoIP to be interstate." (NYPSC Comments, at 2).

In addition to the filed comments, Judge Jed Rakoff of the United States District Court for the Southern District of New York recently ruled against the claim of Metropolitan Telephone for tariffed intrastate access charges[1]:

> Finding that Global has successfully shown that a significant percentage of the (undifferentiated) calls for which it was billed are VoIP, and given the FCC's authority in this area and its limited pronouncements, the Court declines . . . . to apply the filed rate doctrine to the facts of this case.

Also generally supportive of Global's positions is the opinion of Judge Robertson of the District Court for the District of Columbia rejecting Paetec's claims under its

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[1] *Manhattan Telecommunications Corp. v. Global NAPs Inc.*, 08-civ-3829 (JSR) (Findings of Fact and Conclusions of Law issued March 31, 2010) (*Met Tel*) at 6. Judge Rakoff also rejected application of interstate tariffed access charges, but then employed his equity powers to require Global to pay an unjust enrichment sum equal to the applicable interstate tariff rates. Global would expect to challenge the unjust enrichment claims relying a Second Circuit decision in *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998)("the filed rate doctrine . . . bars all of the remaining state law claims for damages . . . because any award of damages would . . . implicate the nondiscrimination and nonjusticiability strands of the filed rate doctrine.").

Also generally supportive of Global's positions is the opinion of Judge Robertson of the District Court for the District of Columbia rejecting Paetec's claims under its intrastate and interstate tariffs because the traffic of Global's supplier CommPartners was largely nomadic VoIP.[2]

The brief comments of the Telecommunications Association of Michigan misstate the requests Global made and refuse to grapple with the precise issues of this proceeding. They state that Global wants a ruling that VoIP pays neither interstate nor intrastate access charges. Global asked for the latter and not for the former, as it made clear. The Michigan brief never mentions the subject of VoIP and intrastate rates and offers no analysis of the law, the *Vonage*[3] decision, or the proper method for separating traffic jurisdictionally.

Almost all of the commentators who favor imposing intrastate access charges on VoIP traffic argue that since it comes to ICOs in TDM, such traffic looks like regular telecommunications and therefore should be subject to the same fees. (*See, e.g.*, NECA Comments at 5). Termination in TDM does not, however, automatically render traffic intrastate. A further answer to this argument is contained in a recent filing, where AT&T acknowledged:

> The Commission was correct to recognize that the protocol conversion inherent in any IP/PSTN service renders it an information service [and not telecommunications] under existing precedent * * * * *VoIP is a transformative service*, "with

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2 *Paetec Communications, Inc. v. CommPartners, LLC*, 08-cv-0397-JR (D.D.C. Feb. 18, 2010) (*Paetec*). Judge Robertson rejected the type of unjust enrichment claim that Judge Rakoff had granted.

3 *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404, 2004 WL 2601194 (2004).

> characteristics in many ways distinct from pre-existing telephone services" . . .

Available at: http://fjallfoss.fcc.gov/ecfs/document/view?id=6520191786 (emphasis added).

Various commentators argue that this Commission's statement in *Vonage* that it was not resolving intercarrier compensation issues means this Commission did not intend to affect the viability of in-state tariffs. (*See, e.g.*, AT&T Comments at 10). Global interprets this statement as meaning the Commission wished to engage in further thought about the VoIP rates it would set. Because state commission jurisdiction and the literal wording of in-state tariffs require that the affected tariffs be legally and factually intrastate, *Vonage* was logically fatal to application of those tariffs. This result may not have been the primary motivation for this Commission's ruling in *Vonage*, but it flows inevitably from it. The opposite result, chaos in the states and increasing state-level attacks on VoIP companies, was clearly condemned in *Vonage*.

The U.S. Telecom Association, which has filed a very short comment which admittedly discusses nothing about the New York, New Hampshire, Pennsylvania or Maryland findings and holdings also agreed with the Petition's goal of clarifying how VoIP should be treated. Although it opposes some of Global's contentions, U.S. Telecom says that it ". . . . endorses the classification of VoIP as a federally regulated non-common carrier information service . . . ." (U.S. Telecom, at 3).

The brief comments of the California PUC end with a one paragraph statement of their position:

> Thus, while there are pressing questions associated with IP-PSTN traffic that the Commission should clarify as soon as possible, any such resolution should be general, not limited to GNAPs, and not retroactively

> change the terms of the existing ICAs, including the ICAs into which GNAPs has entered with connecting carriers.

(CPUC Comment, at 6).

Global agrees with this entire statement. Obviously the most important part of the statement for this proceeding is that there are pressing problems that must be settled now. Further, Global did state clearly that all the statements in its declaratory requests would apply generally, not just to Global. The only state proceedings Global seeks to affect are those in New Hampshire, Pennsylvania and Maryland, not in California.

C. The Comments Support Rather than Refute the Requested Declaration Regarding the Impropriety of Imposing Intrastate Tariff Charges on Portions of Jurisdictionally Mixed VoIP.

No commentator cited any case in which a successful separation of nomadic VoIP, fixed VoIP, alleged "IP-in-the-Middle" and non-VoIP calls actually occurred. As *Vonage* points out, the costs associated with this segregation could be exceptionally high and should not be imposed upon carriers who have no independent business reason for performing the segregation in the first place. Further, though not encompassed in the scope of Global's requested relief, any guidelines for classification of these forms of traffic remain inadequate pending clarification of enhancement standards.

The submitted comments of Centurylink, Frontier and Windstream, while appearing to oppose Global's proposals, mention a ruling that is in fact helpful to Global. Those parties' comments (at 14 n.35) cite the MTS ruling[4] and remind Global that in arguing for its requested clarification on the imposition of intrastate charges on mixed VoIP, it could have cited the FCC's "over 10%" rule set out in that proceeding. The

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[4] *MTS/WATS Market Structure Order Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board* , 4 FCC Rcd 5660-1 (1989).

comments, however, try to distinguish the situation in that proceeding from this one, by suggesting that the 10% rule is not appropriate for VoIP calling because there supposedly are good records of the end points of each call. Of course this statement is not true, as was noted in *Vonage* and demonstrated in a recent hearing in Pennsylvania.

What is true is that when records show that calls reaching Global began with phone numbers owned by ICOs or ILECs, those calls must have been sent to the ESPs who forward them to Global by another carrier, an IXC, because the ICOs, AT&T and Verizon never send traffic directly to Global. Further, regular call records fail to reveal that the actual phone numbers were sold to Vonage, Packet 8, Skype and BroadVoice, who are originators of VoIP traffic, who have no OCNs, and who could have resold those numbers anywhere in the world for use anywhere in the world.

In any event, in light of this reminder, Global agrees with the statement that the *MTS* 10% rule could apply in VoIP cases, though we believe that even a 51% rule would be an improvement over the present state of confusion, and would eliminate the necessity for factual determinations that are prohibitively expensive as was noted in the *Vonage* case, where this Commission stated:

> Moreover, the significant costs and operational complexities associated with modifying or procuring systems to track, record and process geographic location information as a necessary aspect of the service would substantially reduce the benefits of using the internet to provide the service and potentially inhibit its deployment and continued availability to consumers.

Vonage, ¶23.

A number of the commentators suggest that some or much of Global's traffic (or that of other VoIP forwarders) is the identical type of traffic involved in *IP-in-the-*

Middle.[5] However, this Commission ruled that its holding against AT&T was limited to the special facts that AT&T: 1) acted as an IXC from the outset of the call; 2) added no beneficial enhancements; and 3) apparently achieved no additional efficiencies and did not achieve lower rates for its customers. Clearly, therefore, an enhanced phone call could fall outside the *IP-in-the-middle* rule even if it did not originate in IP.

More importantly, this Commission has already made clear in *Vonage* that it declared VoIP calls to be jurisdictionally interstate in order to set the rules for all forms of VoIP. This point was recognized in the Eighth Circuit's affirmance of *Vonage*, where the Court of Appeals held:

> A reasonable interpretation of this language is the FCC has determined, given the impossibility of distinguishing between interstate and intrastate nomadic interconnected VoIP usage, it must have sole regulatory control. Thus, while a universal service fund surcharge could be assessed for intrastate VoIP services, the FCC has made clear it, and not state commissions, has the responsibility to decide if such regulations will be applied.[6]

As can be seen from *Palmerton*[7], a rule allowing state commissions to segregate VoIP calls into calls that underwent net protocol conversion and what that commission perceives to be "IP-in-the-middle calls" would lead to lengthy and extensive fact hearings, debatable rulings subject to federal court reexamination without much

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5 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97, ¶ 9 (released April 21, 2004) (*IP-in-the-Middle*).

6 *Vonage Holdings Corp. v. Nebraska Public Service Commission*, 564 F.3d 900 (8th Cir. 2009).

7 *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and other affiliates*, C-2009-2093336, Initial Decision issued August 11, 2009; *Palmerton Telephone Company v. Global NAPs South, Inc., et. al.*, Docket No. C-2009-2093336, Opinion and Order (entered March 16, 2010) (*Palmerton*).

guidance, and lack of uniformity in the ultimate results. In *Palmerton*, the ALJ, having evaluated the testimony of Global's telecommunications expert concluded that removal of background noise, estimation of lost packets, and preparation for use of short codes was beneficial enhancement taking Global's traffic outside of the *IP-in-the-middle* exception. The full Commission, without the use of any expert, simply concluded they were unimpressed with this level of enhancement, and thus would reject the ALJ's finding.[8]

Therefore, if the Commission does not issue the second requested clarification, or does not preempt the Pennsylvania decision, a federal judge reviewing the decision would be forced to determine whether the Commission had any right to adjudge the adequacy of enhancement and whether it used a standard compatible with what the FCC would have done. The Pennsylvania PUC's holding is directly contrary to the ruling in the *Frontier* case,[9] which correctly declined plaintiff's invitation to rule on whether the asserted enhancement was adequate because of the (correct) conclusion that such evaluation lies within the exclusive jurisdiction of the FCC.

D. The Comments Support Rather than Refute the Requested Declaration that use of the LERG Regime to Determine the Geographic End Points of Numbers is Inappropriate with Respect to Nomadic VoIP Traffic.

Acknowledging the confusion resulting from the use of LERGs as a proxy for call location, Verizon states in its comments that:

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8 *Palmerton*, Opinion and Order (entered March 16, 2010), *supra.*

9 *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, No. 05- CV-6056 (CJS), 2005 WL 2240356 (W.D.N.Y. August 2, 2005).

> In recent years, telephone numbers have become an increasingly less reliable 'proxy . . . for subscribers' geographic locations when making or receiving calls'- that is, for the end points of a voice communication. (citation omitted) Wireless services, location-independent services, "pick-your-own-area-code" services, number portability, and call forwarding have all strained the link between a customer's telephone number and his or her physical location. But at the *same time, telephone numbers remain a good tool for determining the jurisdictional status of TDM-originated calls (jurisdictional factors, which some carriers use to determine jurisdiction, require, among other things, auditing and similar accuracy checks*).

(Verizon comment, at 11) (emphasis added).

Qwest Communications similarly stated:

> Geographical end-points and not telephone numbers would be the proper determinants of whether a call is local versus non-local (or, for non-local traffic, whether interstate or intrastate access charges apply). As Qwest explained in previous filings, carriers may use telephone numbers as a surrogate for billing purposes provided, however, that, as in other contexts such as nomadic wireless use, there must be an ability for carriers to ensure that, in the end, billing accurately reflects jurisdiction.

(Qwest comments, at 8). This same conclusion was reached in *Met Tel*, where Judge Rakoff held that:

> The evidence reflects that use of telephone numbers to determine the geographic correspondence of calls is seriously flawed in the context of mobile phones and VoIP calls. For example, VoIP subscribers may select the area code of their phone numbers regardless of where the subscribers are actually located; and VoIP providers such as Broad Voice make no effort to determine the location of their customers vis-à-vis the selected phone numbers' geographic assignments.

Most pro-LERG commentators ignore the fact that the issue really involves three sub-questions: First, may or should LERGs be used to distinguish in-state traffic from interstate when no other information is present or available? Second, can LERGs reliably be used to identify the originating location of traffic when trial and cross-examination show the billed calls actually originated out of state, when the calls cannot be proved to

have originated instate, or when the traffic is shown to be something other than Feature Group D landline traffic? Third, if the second question is accepted as being relevant to determining the location of traffic, is it acceptable for state commissions to deny a VoIP carrier or forwarder a full scale fact hearing including cross-examination of the companies who supposedly originated the calls in question? Comments from groups like NECA stress the idea that LERG analysis is convenient or traditional, but they do not comment at all on the real issues, which are those set out in sub-questions two and three above.

The importance of the above points is illustrated by the evidence adduced during the *Palmerton* hearing in Pennsylvania. There, seven companies appeared as witnesses for Palmerton to verify that the calls for which Palmerton billed Global were ordinary instate landline calls. On cross-examination, each of them admitted that they never sent traffic to Global. They also stated that Palmerton allowed subscribers to pick a discount long distance carrier, such as Sprint, for all long distance calls including in-state long distance calls. They also testified they had no knowledge of what technology Sprint or others used why or whether they sent traffic to Transcom or CommPartners, or whether Transcom or CommPartners did or did not beneficially change the form or content of the calls before sending them to Global in Reston, VA for ultimate return to Pennsylvania.

The most striking evidence resulted from the cross-examination of Paetec concerning 70 calls which Palmerton billed under its intrastate tariff. Asked whether any of those calls originated in the state of Pennsylvania, Paetec answered under oath that it had sold all those numbers to Vonage, and thus lacked any knowledge as to where the calls utilizing those numbers actually originated or of the protocol in which they

originated (since Vonage uses only IP-technology, the calls obviously originated in IP). Given this testimony, the full Pennsylvania commission's ruling that Global must pay Palmerton full intrastate rates for those 70 calls or face expulsion from the state is shocking.

In contrast to Verizon, some of the ICO briefs contend that LERGs are not difficult or confusing to use for identification purposes because all carriers have identifications numbers (OCNs) which can be found in the LERGs, but that is absolutely untrue in regard to VoIP. Vonage, Packet 8, Skype, BroadVoice and other key suppliers of traffic to Global do not have OCNs because they are software providers, not registered carriers. As the Commission noted in *Vonage*, and as Global proved in Pennsylvania and New York, companies like Vonage and BroadVoice obtain telephone numbers by renting them from carriers with an OCN. That being the case, if Global is billed for nomadic VoIP calls that are treated as local due to the location of the ostensible owner of the OCN who is listed in the LERG, the available data is entirely false or unreliable. The ostensible owner of the phone number certainly did not originate the call (its renter did) and there is no way of knowing whether the call originated in the same city or state where the ICO claiming access charges received the call.

E. The Comments Support Rather than Refute the Requested Declaration that VoIP Forwarders/Intermediate Carriers Are Not Liable for Tariffed Access Charges.

Global's Petition contended that this Commission had already determined intermediate carriers of VoIP do not owe access fees,[10] and instead are to pay negotiated

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[10] *IP-in-the-Middle*, n. 92, *supra*.

interconnection rates subject to the cost-based standards of Section 251 in *Time Warner*.[11] Global's reading of these rulings was fully accepted by the Maryland ALJ:

> Therefore, I conclude that on the basis of the FCC's *Phone-to-Phone IP Telephony* order Global is an intermediate carrier *not subject* to local access charges.[12]

TVC states in its comments that the NYPSC rejected this same contention but, in fact, the NYPSC opinion simply stated the issue was moot because the commission would not allow TVC to assess its access charges anyway. They stated:

> While GNAPs claims that it is not subject to access charges because it is an intermediate carrier, this claim is moot. We have already decided we cannot impose intrastate access charges on nomadic VoIP because it is an interstate service.

TVC[13], at 16-17.

A number of submissions argue that Global misreads *Time Warner*—that the ruling allows for tariff liability as well as Section 251 negotiated rates, but that analysis is flawed. Two submissions, one by NECA and one by the Ad-Hoc Group of Rural Telephone companies, argue Section 251 is compatible with intrastate access charges on VoIP because Section 251(g) preserves exchange access regimes predating the 1996 Act. Actually, this contention was rejected twice by the DC Circuit (in *WorldCom* and *Core*), where it was stated that 251(g) could not preserve charges on technologies and carrier

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11 *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order, para. 17 (March 1, 2007) (*Time Warner*).

12 *Armstrong* at 23-24. (Emphasis in original).

13 PSC Case No. 07-C-0059, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges,* Order dated Mar. 20, 2008 (*TVC*).

relationships not existing prior to 1996. This Commission, in its Further Order on Remand of its ISP-Bound traffic ruling[14], considered the reach of section 251(g) and found that it was limited to pre-Act tariff regimes as applied to pre-Act carriers with respect to pre-Act types of traffic. Citing *WorldCom, Inc. v. FCC*, 288 F.3d 429, 483 (D.C. Cir. 2002), this Commission confirmed that section 251(g)'s preservation of state authority to retain pre-TCA access charge regimes does not apply to ISP-bound traffic because "there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.'" Further Order on Remand, ¶16. Even more so here, where there was no pre-Act obligation relating to intercarrier compensation for VoIP traffic because there were neither carriers nor VoIP prior to passage of the Act. Thus, the Commission's holding in *Vonage* superseded any contrary implication from section 251(g). In rejecting the 251(g) argument, Judge Robertson stated in *Paetec* that:

> Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a 'pre-Act obligation relating to inter-carrier compensation.' *Worldcom*, 288 F.3d at 433. There cannot be a pre-Act obligation relating to intercarrier compensation for VoIP, because VoIP was not developed until the 1996 Act was passed. *Accord SW. Bell*, 461 F.Supp.2d at 1080 ('Because [VoIP-to-TDM] is a new service developed after the [1996] Act, there is no pre-Act compensation regime which could have governed it, and therefore §251(g) is inapplicable.'). Paetec's submission that the analysis should turn not on whether companies actually paid access charges for VoIP prior to the Act, but instead whether pre-Act law *would have* supported such charges – is not so much an argument as an invitation to speculate. The invitation is declined.

Paetec, at 7-8.

Commentators in favor of imposing state access charges on VoIP forwarders contend that as long as VoIP providers are exempt from these legacy

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[14] Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (released November 5, 2008).

rates there is no policy reason to treat forwarders differently from regular long distance companies. (*See, e.g.*, AT&T Comments). VoIP providers, however, are primarily software companies, not carriers, and do not need an exemption because they never pay tariffs. It also cannot seriously be contended that exposing VoIP traffic to outlandish local tariff rates of $.04-.06 being sought in Pennsylvania and Maryland will not cripple the ability of the VoIP industry to provide its low-cost, consumer friendly services.

F. General Comments.

Global replies here to comments, often quite negative, that make points extraneous to the four requests Global made.

1. Comments Suggesting that Global's Requests Are Only in its Interest Are Incorrect.

The opposing comments try to create the impressions that: 1) Global is the only advocate of the points in its petition; and 2) that it is asking for new rules to be made by the FCC. Both points are demonstrably not the case, for similar reasons.

First, the issues raised in Global's request all reflect points of law on which Global has prevailed before various tribunals in recent years. All four of the points of law on which Global seeks declaratory rulings were decided in Global's favor in a recent ruling by a Maryland ALJ.[15] Global's first three interpretations were accepted by ALJ Weismandel of the Pennsylvania Public Utility Commission[16] but reversed by the full

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15 *Proposed Order In The Matter Of The Investigation, Examination And Resolution Of Payment Obligation Of Global NAPs - Maryland, Inc. For Intrastate Access Charges Assessed By Armstrong Telephone Company – Maryland* (December 30, 2009) (*Armstrong*).

16 *Palmerton*, Initial Decision issued August 11, 2009, *supra*.

commission on what it saw as states' rights policy grounds.[17] The issues posed in Global's first and second declaratory requests invoke the reasoned holding of the unanimous New York Public Service Commission in the *TVC* matter.[18] Global's first two points are also embraced by Judge Rakoff in *Met Tel.*

As to the second point, Global requested not promulgation of new rules, but the clarifications of Commission decisions in and around 2004. The Pennsylvania Telephone Association (PTA) quotes this Commission as stating in *Vonage*[19] that it was not setting intercarrier compensation rates, implying that this is what Global is attempting to force this Commission to do. (Comments of PTA, at 11). The Commission did not set intercarrier compensation rates, but *Vonage* firmly established a jurisdictional classification by use of the impossibility doctrine, rendering nomadic VoIP interstate in nature. Global argued that such an unambiguous classification can only mean that nomadic VoIP traffic cannot be classified as intrastate for tariff purposes, and that State commissions are not free to ignore FCC classifications and assertions of jurisdiction. Thus, in its petition here, Global was merely seeking the FCC's clarification of that ruling's meaning, not inviting rate setting.

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17 *Palmerton,* Order dated March 16, 2010, *supra.*

18 *TVC, supra.*

19 *Vonage, supra.*

2. Global's Resistance to Interstate Tariff Charges is Irrelevant and is, in any Event, Justified on the Basis of Numerous Precedents Established by Itself and Others.

A number of the submissions, such as those of the PPUC, CPUC and AT&T, stray from the issue of intrastate tariffs to engage in irrelevant compilations of Global's resistance to interstate tariffs and to paying legacy rates for VoIP under ICAs containing no reference (let alone rate applicable) to VoIP. Commentators who do not like Global's message adopt the strategy of attacking the messenger instead.

Many of the commentators seem to contend that Global is a lone maverick refusing to pay bills that all upstanding companies pay. (*See, e.g.*, Palmerton Comments at 14). Such statements are directly contradicted by the statements of NECA that it has compiled data indicating disputing VoIP traffic is rising dramatically, affecting nearly 20% of revenues. (NECA Comments at 14). Because VoIP companies do not deliver their own calls, a VoIP forwarding and enhancing industry has arisen. The key players in that industry, Transcom, CommPartners, Unipoint (Point One), ChoiceOne and Global have all refused to pay state (or federal) access charges, litigated for the right not to pay them, and have been overwhelmingly successful. Transcom, Unipoint, Global and, recently, CommPartners, have all won key cases.[20] What Global's seeks to diffuse is a desperate rearguard counterattack by some state commissions and their local ICOs to find a way around or over contrary federal rulings.

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[20] *See Paetec, supra*; *In the Matter of the Investigation Examination and Resolution of Payment Obligation of Global NAPs Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company –Maryland*, Case No. 9177, Proposed Order of Hearing Examiner (issued Dec. 30, 2009)(*Armstrong*); and *Southwestern Bell Tel. Co. v. Vartec Telecom. Inc.*, 2005 WL 2033416 (E.D. Mo.).

A frequent point made by the commentators was that Global should at least pay lower, interstate rates instead of merely opposing intrastate rates. Interstate tariff disputes, however, are irrelevant to Global's petition, and are outside the jurisdiction of state commissions. Only federal district courts, not state commissions, have jurisdiction over actions seeking collection of tariffed interstate access charges.

The plaintiffs in *TVC*, *Palmerton* and *Armstrong*[21] each chose to file only those portions of their claims which were appropriate for state commission review: claims for terminating those calls which appeared to be intrastate. None of them chose to file an action attempting to recover interstate tariff charges. However, they complained bitterly to the state commissions and in their comments here that Global's refusal to pay current interstate access charge amounts evidences some sort of immorality that should influence the results of cases brought to recover intrastate tariffs. The point, however, is simply an irrelevance to resolution of issues concerning application of intrastate tariffs.

Even if these claims had been filed in the appropriate forum, they would have had little chance of success. When federal courts have had these disputes before them, their reactions have fallen into two categories. In cases such as *Paetec*,[22] *Southwestern Bell*,[23] *Transcom*[24] and *MetTel* courts have held that if the traffic at issue originated in IP and

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21 *Armstrong, supra.*

22 Civil Action No. 08-0397 (Filed February 18, 2010) (*Paetec*).

23 *Southwestern Bell v. Mo. Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1081-82 (E.D. Mo. 2006).

24 *In re Transcom* (Case No. 05-31929-HDH-11) (September 20, 2007). *See also In re Transcom Enhanced Services*, LLC (Case No. 05-31929-HDH-11, Memorandum Op.) (April 28, 2005).

terminated on the PSTN, it underwent a net protocol conversion, and thus was an information service, immune from the present interstate tariff charges. In several other cases, *e.g. Frontier Telephone*[25] and *SNET*[26] the courts have held they could not impose interstate tariff charges on a carrier who transmits VoIP because there is currently an interstate access charge moratorium until the FCC classifies that traffic and sets the applicable rates.

The filing parties who are anxious to proclaim that Global's points are all unsound seem entirely unwilling to cross swords with those tribunals who have ruled for Global or have otherwise embraced Global's legal arguments. Global's defenses have been accepted by the NYPSC,[27] by Judge Hall in the Connecticut district court,[28] by the MDPSC,[29] by ALJ Weismandel of the Pennsylvania Commission[30] and most recently by Judge Rakoff in the Southern District of New York.[31] Almost none of the commentators actually attack the findings or reasoning of these specific rulings.

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25 *Frontier Tel., supra.*

26 *Southern New England Telephone v. Global NAPs, Inc.,* (*SNET*), Civ. Action No. 3:04-CV-2075 (JCH) 2005 WL 2789323, at*6 (D. Conn. 2005).

27 *TVC, supra.*

28 *SNET, supra.*

29 *Armstrong, supra.*

30 *Palmerton, supra.*

31 *MetTel, supra.*

Similar positions have been set out by federal judges immunizing Global's suppliers Transcom[32] and CommPartners[33] from both interstate and intrastate access charges. The Wisconsin Commission similarly immunized MCI from having to pay such charges.[34] None of the commenting parties attempt to discuss why they view the findings of these tribunals to be incorrect.

Further, none of the submissions are able to quarrel with the findings of fact made by the above tribunals. A number of the submissions, such as NECA's comments, assert that Global's traffic is probably overwhelmingly non-VoIP. (NECA Comments at 12). None of these submissions, including NECA's, provide any evidence or cite to actual cases. On the other hand, the factual holdings in the recent trials before the Southern District of New York, the NYPSC, the Pennsylvania PUC, and the Maryland PSC all ended with the conclusions that Global's traffic was "primarily nomadic VoIP."

NECA, in its attempt to collaterally attack these findings makes the peculiar point that Global probably transmits large amounts of traffic from cable companies (*i.e.*, fixed rather than nomadic, VoIP). (NECA Comments at 10). There are several problems with this logic. First, it is not clear why a cable VoIP company in a state asked to transmit a call to a party in the same state would instead of sending it directly, send it to Transcom or CommPartners in Texas or Nevada then on to Global in Reston, Quincy or Old Slip

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32 *Transcom, supra.*

33 *Paetec, supra.*

34 *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Interconnection Terms and Conditions and Related Arrangements with Wisconsin Bell, Inc. d/b/a/Wisconsin Pursuant to 47 U.S.C. § 252(b),* PSC Ref. No. 54417, Arbitration Award of May 15, 2006 (*MCImetro Access Award*).

NY, and finally back to the original state. Global knows of no evidence that cable companies send traffic directly to it. Second, if a cable company did begin Global's traffic, such traffic, according to FCC definitions and rulings in *IP-in-the-Middle*, would undergo a net protocol conversion, rendering it an information service immune from access charges. *See e.g. Southwestern Bell, Paetec, supra.* Lastly, this Commission clearly stated that it would preempt any state attempts to regulate cable/fixed VoIP in *Vonage*.

3. Global Litigates its Disputes over ICAs because certain LECs Urge ICA Interpretations that Are Inconsistent with their Terms and with Federal Law.

AT&T, the CPUC and Verizon state that Global's litigation of its ICA disputes evidences an aversion to paying terminators of its traffic the fees they are due. (Verizon, (AT&T comments, at 2, 5); (CPUC comments, at 4); (Verizon comments, at 5, 6, 7). Since Global raised no issues in its petition in regard to ICA litigation, these comments are irrelevant here.

However, regardless, these do not prove what the commenting parties claim. These ICA litigations, many now on appeal, involve not attempts to avoid payment, but to have the contracts applied according to their terms. In the litigation of Global's ICA with Cox, the CPUC took the position that any contract which is silent on the issue of VoIP must be interpreted to mean full access rates must be paid for VoIP. Global responded that since its contracts define the traffic subject to access charges as "telecommunications" by reference to the TCA and invest Global with all of the rights it has under the TCA, the issue of whether Global's traffic is changed in form and content

determines whether or not Global should pay under that contract. It thus simply argued that a contract cannot legally be interpreted as a waiver of governing federal law.

AT&T, in its litigations with Global. has employed the anomalous strategy of arguing in court that the ICAs clearly reflect a meeting of the minds that all access charges must be paid regardless of how much of the traffic is nomadic VoIP or beneficially altered in form or substance, even though it is the author of clauses in those ICAs stating that there is no meeting of the minds on VoIP. Thus, Global has argued, logically, that the existence of an ICA clause stating that the ICA contains no meeting of the minds on VoIP, means that contract cannot be read to obligate it to pay legacy rates for VoIP.

4. Global Espouses and Follows a Clear Policy in Favor of Paying for Traffic Termination Under the Market-Derived Standards of 47 U.S.C. § 251.

A number of the filings falsely assert that Global has a strategy of paying nothing for termination of its traffic and imply that such behavior should disqualify it from receiving the legal clarifications it requests. (*See, e.g.*, TDS Comments at 3). These comments have no relevance to Global's requested relief, and the Commission need not address them in rendering the requested clarifications.

Many ILECs have urged state commissions (with some success)[35] to set policies allowing them to pay nothing when Global or other carriers terminate their ISP-bound traffic. Further, many carriers have "bill and keep" provisions in their ICAs, allowing

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35 DTE 02-45 Final Order (December 12, 2002).

both sides to pay nothing to each other.[36] This Commission has never suggested that a "bill and keep" approach involves questions of morality.

In any event, Global does not advocate for the free use of the PSTN in its petition or by its behavior. The clarifications requested by Global, particularly the first three, leave entirely open the question of whether a VoIP terminating rate which is below the tariff rate, such as $.00045 or $.0007, should be embraced by this Commission or even possibly in other tribunals as a temporary measure.

Global has in fact already paid such rates to an incumbent with whom it was involved in a dispute. TVC's filing correctly acknowledges that Global has sent it a check for all past-due MOUs at the Verizon/AT&T unitary rate of $.00045, which TVC has accepted but criticized as being too low. (TVC Comments at 4).

Global has similarly offered this rate to petitioners in three other disputes, but the New Hampshire PUC, Pennsylvania PUC and Maryland PSC filings all fail to mention that Global has offered to negotiate interconnection with the plaintiffs in those cases at the $.00045 rate, plus free equipment to facilitate termination in IP instead of TDM.

AT&T similarly omits the fact that Global has offered it negotiated rates for six years and been repeatedly rebuffed in favor of litigation to obtain tariffed legacy rates.

Core Communications also discusses Global's payment for VoIP traffic, although its short comments do not directly discuss any of the four requested clarifications or any of the three state cases. It states that carriers like Global should be required to pay some federal rate or to negotiate ICAs or perhaps to be subject to unjust enrichment rulings

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[36] *See* Bill and Keep Amendment to the Interconnection Agreement Between Qwest and ICG Telecom Group. Available at http://www.psc.state.nd.us/jurisdiction/orderlib/2008/08-0814/001-010.pdf

such as that issued in *Met Tel.* (Core Comments at 3). Of course, none of these points is relevant to Global's petition. All the events envisioned by the Core comments will or will not happen depending on other rulings by this Commission, one-on-one negotiations, or court rulings.

Core also states that there is no indication that Global has ever sought to enter into a reciprocal compensation arrangement. (Core Comments, at 2). Global, of course, has ICAs in many states, most of which never mention VoIP and some of which state that the rate for VoIP will await FCC action. As noted above, Global has sought ICAs with ICOs in New Hampshire, Pennsylvania and Maryland and, in beginning each negotiation, has offered to pay the prevailing rate for termination of VoIP, $.00045, employed by major carriers such as Verizon AT&T and Level 3 in more than 20 states.

Also, Core's emphasis on "reciprocal compensation" is somewhat nonsensical in regard to a VoIP forwarder such as Global. Since Global has no subscribers to which it can terminate regular long distance calls at regular rates, it cannot receive reciprocal compensation. In its dial-up business it can earn at most $.0007 for its termination services (and sometimes it earns nothing).

5. The Commenting Parties' Analysis of UTEX is Incorrect.

A number of the replies cite this Commission's recent *UTEX* ruling[37] as evidencing a policy of non-interference in state commission proceedings. *UTEX*, however, involves none of the specific issues raised by Global's petition, and its holding

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[37] *Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC Docket No. 09-134, Memorandum Opinion and Order, 24 FCC Rcd 12573 (2009) (*UTEX*).

would be unaffected by any ruling partially or totally in Global's favor. *UTEX* involves arbitration of an interconnection agreement, a subject not mentioned in Global's petition. There was no issue raised in *UTEX* concerning imposition of an intrastate tariff, and UTEX did not raise any defenses based on contentions that it was an intermediate carrier. Aside from these differences, a clarification by this Commission that the New York PSC read *Vonage* correctly would in no way be inconsistent with the direction by the Commission to the PUCT to apply "existing law", since *Vonage* and footnote 92 of *IP-in-the-Middle* are "existing law", clarification of which would, if anything, aid the Texas commission.

6. AT&T and Verizon's Litigation-Motivated Comments Fail to Show any Weaknesses in Global's Position Either Here or in the Referenced Litigations.

AT&T argues Global's traffic is a kind of enhanced traffic, and that the application of intrastate tariffs to enhanced traffic was held to not be preempted in a 1988 FCC ruling.[38] AT&T fails to focus on the very language it quotes, in footnote 40 of its filing—namely, that there is no preemption when the ESP providers engage in "jurisdictionally *intrastate*" services. Sixteen years after the 1988 ruling, this Commission held nomadic VoIP traffic is jurisdictionally *interstate*, thus removing it from the scope of the language AT&T quotes.

AT&T further relies on the 1988 ruling for the statement that intrastate access charges can be assessed on traffic originating with an ESP within a state's borders. It is

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[38] *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd. 1, ¶318 (1988) ("Under the ESP exemption, ESPs are treated as end users for access charge purposes and therefore are permitted, although not required, to take state access arrangements instead of interstate access charges, or any other intrastate charges to ESPs, when such service providers are using jurisdictionally intrastate basic services.").

not clear why AT&T thinks that its enunciation of the 1988 rule would cut against Global's position, since Global's ESPs, Transcom, Unipoint and CommPartners, are in Texas or Nevada, and Global is being sued for intrastate traffic in Pennsylvania, Maryland and New Hampshire. Further, Global's three ESPs forward the traffic of Vonage, Skype, BroadVoice or Packet 8, all of which offer virtual numbers and full nomadic portability. Thus, calls coming from them are quite unlikely to originate in the states at issue.

Verizon states in regard to Global's request for preemption, that:

> GNAPs argues in the alternative that the Commission should preempt certain specific state commission orders. In the *Vonage Order*, the Commission has already established that all VoIP traffic—regardless of provider or technology—is inseverable and, therefore, interstate for jurisdictional purposes. To the extent a state commission order is inconsistent with this rule, it is preempted. The Commission should reaffirm that prior holding, but there is no basis in the context of the current Petition for preempting states from enforcing their existing rules governing compensation for TDM-based traffic.

(Verizon comments, at 8-9).

Verizon thus acknowledges that *Vonage* supports Global's contention that once an ALJ or court has found on the record that most or any of Global's traffic in fact originates from BroadVoice, Vonage, MagicJack or the like and thus in IP rather than TDM, all state commissions should indeed be preempted from imposing intrastate access charges on that traffic.

II. GLOBAL'S PETITIONS FOR PREEMPTION SHOULD ALL BE GRANTED PROMPTLY.

Each of the state commissions subject to Global's petition has responded. However, only the Pennsylvania PUC has clearly evinced its disregard for federal law by ruling that even though Global's traffic contains nomadic VoIP, Palmerton may still

assess intrastate access charges on all of Global's traffic. The other two state commissions in Maryland and New Hampshire acknowledge that the nature of Global's traffic is determinative, but equivocate as to how to determine the origination points or as to what kind of compensation they can cause Global to pay for that traffic.

A. The Response of the New Hampshire Public Utilities Commission and Comments of New Hampshire ICOs Do not Negate the Need for a Preemption Order Barring In-state Tariff Charges for Nomadic VoIP.

The brief comments of the New Hampshire Commission fail to establish that its solution of the dispute in its state is respectful of FCC rulings and federal law.

The NHPUC takes the position that if any portion of Global's traffic is not nomadic VoIP, Global owes some intrastate tariff charges, and thus can be blocked out of the state for not paying them. This position has at least three flaws. First, under the FCC's 10% rule, *Vonage*, and *TVC,* once traffic is substantially nomadic VoIP, it is all treated as jurisdictionally interstate, rather than being divided up in a complex factual hearing. Second, it is a lack of due process for a state commission to impose dire consequences on Global for failure to pay an unspecified amount under an unspecified standard. Third, this unfairness is exacerbated by the commission's rulings that Global must pay within 30 days and that the NHPUC will neither mediate nor adjudicate what amount is due, but will simply cavalierly rule that if the proffered amount is not high enough to please certain local Vermont companies, then they are deputized to block interstate telecommunications.

As the New Hampshire PUC knows, Global has offered to pay access charges of $.00045, the most frequently used, cost-based figure available in the industry at this time. In fact, that figure is the only figure for VoIP that Global has been able to find in

voluntary contracts involving Verizon, AT&T, Level 3 and the like. The New Hampshire Commission has never ruled on whether it views this as an adequate level of compensation, and apparently does not intend to confront the issue.

Global's petition sought preemption of a tentative order of the New Hampshire PUC which was under reconsideration at the time the petition was filed. The PUC has now reaffirmed its order in some sense.[39] It has authorized the New Hampshire petitioners to block Global's traffic unless Global, within 30 days, offers them a payment for past termination of supposedly intrastate traffic in an amount satisfactory to the NH PUC.

This order makes a mockery of the regulatory process. The NHPUC neither suggests it will review either side's estimates of billable minutes, nor states an intent to analyze the petitioners' methods for estimating the geographic locations of the callers or the relative correctness of their rate demands as compared to Global's rate offer of $.00045 for past or future MOUs. In contrast, the rates so far sought by the New Hampshire petitioners are 20 or 50 times as high.

The order repeats key errors of the order Global had asked the NHPUC to reconsider. The order admits that some, or perhaps most, of Global's traffic is not subject to intrastate rates, while allowing the petitioners to block all of Global's traffic if Global does not pay them a sufficient amount of money for their undetermined number of intrastate minutes, at a rate which the parties have not yet set. (*Order*, at 15). Not only does the order place Global's traffic at risk of being blocked by the petitioner, it also

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[39] *Order Denying Motion for Stay, Rehearing or Reconsideration in Joint Petition for Authority to Block the Termination of Traffic from Global NAPs Inc.*, Order No. 25,088, Docket No. 08-028 (April 2, 2010) (*Order*).

allows for potential blocking by FairPoint, the ILEC dominating the state of New Hampshire, who has told the Commission that it will also block Global's traffic to the state as soon as the petitioners are permitted to do so.

B. The Response of the Pennsylvania Public Utility Commission and Comments of Pennsylvania ICOs Do not Negate the Need for a Preemption Order Barring In-state Tariff Charges for Nomadic VoIP.

Global's only hesitation in calling for preemption of the Pennsylvania ruling was that it was rendered before Judge Robertson's ruling in *Paetec* and might be altered in deference to a federal court's interpretation of the effect of previous VoIP rulings on the applicability of state tariffs. They also reject the clear factual and legal findings of cases involving *Transcom*.[40] Global would send the PAPUC a copy of the recent rejection of tariff claims in *Met Tel*, but there seems no point in doing so.

Regrettably, the PAPUC remains defiant, simply stating that it understand FCC rules and federal decisions better than federal judges do while flatly declining to follow such rulings. This seems to evidence the kind of nullification theory made famous by John C. Calhoun of South Carolina and later championed by the governor of Texas in threatening to secede from the union. Meanwhile, Pennsylvania ICOs, emboldened by the PAPUC's defiance of federal law, have lined cases against other VoIP forwarders.[41]

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40 *See, e.g., In re Transcom*, Case No. 05-31929-HDH-11 (Bankr. N. D. Tex., Apr 28, 2005).

41 *See, e.g., Buffalo Valley Telephone Company v. CommPartners, LLC*, C-2009-2105918.

The commentators supporting the PAPUC result give short shrift to the careful, fact-based opinion of ALJ Weismandel. As the Supreme Court repeatedly noted, agencies attacking their own fact-finders must have sound reasons for doing so.[42]

The separate statements of PAPUC commissioners, however, emphasized a desire for some payment by Global, rather than any fierce loyalty to the aforementioned intrastate tariffs being asserted. Since Global has offered Palmerton direct interconnection, compensation backward and forward at the Verizon/AT&T rate of $.00045, and free IP equipment, it still remains possible that if this Commission makes clear that application of the intrastate tariff rate is unacceptable under federal law, a solution in Pennsylvania will be reached on the basis of Global's offer.

C. The Response of the Maryland Public Service Commission and Comments of Maryland ICOs Do not Negate the Need for a Preemption Order Barring In-state Tariff Charges for Nomadic VoIP.

The Maryland PSC's response concentrates on the idea that the outcome of Global's case before it should depend on the actual geographic location of the originating calls. (MDPSC comments, at 3). That is a peculiar statement to make at this time, because the hearing is over and little or no evidence was taken on that point. Unlike Palmerton in Pennsylvania which submitted a LERG analysis of about 2,000 calls (which fell apart on cross-examination), Armstrong, the petitioner in Maryland, submitted only three calls: one interstate and one originating in IP. Thus, it will not be possible to find the actual location of the originating callers unless the commission remands for a much more extensive hearing.

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42 *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

This statement also fails to address the bases for Global's triumph before the MDPSC's ALJ. The thoughtful opinion of ALJ McGowan concluded access charges were also not applicable because Global's traffic was nomadic VoIP and because Global was a forwarder, rather than an originating, interexchange carrier. The Commission's focus on the end points issue implies rejection of these other two conclusions but cites no basis for such rejection.

In fact, the comments of the Maryland ICO write as though AJL McGowan's ruling did not exist. Judge McGowan found as matters of fact that: 1) Global transports traffic on behalf of ESPs (*Proposed Order* at 20); 2) the ESPs all serve VoIP providers who exclusively transmit VoIP traffic (*Id.*); 3) a significant portion of Global's traffic is VoIP and it is possible that Global transmits exclusively VoIP (*Id.*); 4) Global's traffic is a mixture of fixed and nomadic VoIP (*Id.* at 22); 5) the ESPs Global serves enhance the VoIP they receive (*Id.* at 21); 6) Global converts the VoIP traffic into TDM prior to transmission to the Verizon tandem (*Id.* at 21); 7) the plaintiff's three call sample is unrepresentative of all the calls coming from Global and therefore not useful to indicate which of Global's calls are local and which are interstate (*Id.* at 21, 23); 8) the plaintiff has not been able to separate Global's nomadic from its non-nomadic VoIP (*Id.* at 23); 9) Global does not originate calls on the PSTN and does not directly connect with any customer equipment (*Id.* at 24). Judge McGowan also found, as matters of law, that: 1) Because Global's traffic is largely VoIP, it is exempt from intrastate access charges (*Id.* at 19); 2) the portion of Global's VoIP traffic that is nomadic is preempted from state regulation by *Vonage* (*Id.* at 21); 3) the impossibility exception prevents the separation of intrastate nomadic VoIP from interstate nomadic VoIP. (*Id.* at 22); 4) because Global's

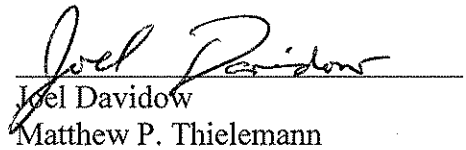
traffic is a mixture of fixed and nomadic VoIP, charging Global intrastate access charges violates federal law (*Id.* at 22); 5) Global is an intermediate carrier based on *IP-in-the-Middle* and therefore not subject to local access charges (*Id.* at 24); 6) the plaintiff had the burden of proof to show that the traffic it received from Global was local telecommunications traffic subject to access charges. *Id.* Such detailed and well-supported findings cannot be lightly set aside.

The implication of the Maryland brief is that the commission needs no guidance from the FCC. However, this is paradoxical in comparison to the MDPSC's comment that if Global's traffic "can be tracked from geographic end-point to geographic end-point, intrastate charges might apply." (MDPSC comment, at 4). It appears from this comment that guidance in regard to LERGs and the status of intermediate carriers would in fact clarify the issues in the case for them and move them toward a result that is acceptable under federal law.

CONCLUSION

The comments, viewed as a whole, fully justify prompt issuance of the declarations and preemptive rulings requested here.

Respectfully submitted by



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